Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

JOHN P. KIM,

Petitioner,

v.

THOMAS E. WHITE, Secretary of the Army,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Fourth Circuit's standard for determining which employer activity violates 42 U.S.C. § 2000e-3 fail to effectuate the purpose of that law? If so, should this Court annunciate a standard which prohibits any conduct which deters, discourages or chills employees in the exercise of their rights?

2. Does a federal government employee state a cause of action for retaliatory discharge under 42 U.S.C. § 2000e-3 (Title VII's "Opposition Clause") when his complaint alleges that: (1) as a condition precedent to obtaining leave without pay he was impermissibly required to submit a post-dated resignation; and (2) after he withdrew the impermissibly imposed resignation he was denied reinstatement to paid employment, to which he was entitled?

LIST OF PARTIES TO PROCEEDINGS IN THE COURT BELOW

John Kim. Mr. Kim was Plaintiff in the United States District Court for the Eastern District of Virginia, Appellant in the United States Court of Appeals for the Fourth Circuit. He is Petitioner herein.

Louis Caldera. Mr. Caldera was at the time this suit was initiated the Secretary of the Army. As such he was named as Defendant in the United States District Court for the Eastern District of Virginia, Appellee in the United States Court of Appeals for the Fourth Circuit. He remains named as Respondent herein. The current Secretary of the Army is **Thomas E. White**.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Virginia (Cacheris, J.) granting Respondent's Motion to Dismiss and Denying Respondent's Motion for Summary Judgment was delivered orally from the bench and is unreported. A transcript of the Court's oral opinion and subsequent written order are reproduced in Appendix B.

The *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit affirming the District Court is unreported and is reproduced in Appendix A. It can be found at 2001 U.S. App. LEXIS 21240 (October 1, 2001).

STATEMENT OF JURISDICTION

This is a petition for review of the opinion and order of the United States Court of Appeals for the Fourth Circuit, dated October 1, 2001. This Court may assert jurisdiction pursuant to 28 U.S.C. § 1254(1).

The decision of the United States Court of Appeals for the Fourth Circuit for which review is sought concerns an important question of federal law that has not been and should be settled by this Court.

STATUTE AND REGULATION INVOLVED

42 U.S.C. § 2000e-3 (*see* App. C).

Army Regulation 215-3, ch. 5, § V (*see* App. C).

STATEMENT OF THE CASE

Petitioner John P. Kim filed a complaint alleging that he had been retaliated against because he engaged in activities protected by Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-3). More specifically he alleged:

On June 1, 1989 he began his employment as a personnel clerk at Dragon Hill Lodge (DHL), a hotel operated by Respondent on the Yongsan Army base in Seoul Korea. On July 31, 1989, Mr. Kim was terminated for allegedly unsatisfactory performance. In response, he filed an EEO complaint claiming, *inter alia*, that he was terminated because of his national origin (Korean).

On July 2, 1991, an EEOC administrative judge found Mr. Kim's termination to have been discriminatory. As a result, DHL agreed to restore him to his former position as a personnel clerk. Instead he was assigned as an English instructor. Following protests by his attorney, Mr. Kim was, on October 31, 1991, reassigned as a personnel clerk. During this time, DHL managers branded him a "trouble maker", and expressed their hopes that he would never return to work. When he returned to work, Mr. Kim was subjected to a number of adverse working conditions, that were not imposed on similarly situated employees.

On April 22, 1992, Mr. Kim requested five months of leave without pay ("LWOP") in order to accompany his wife on a military transfer to Fort Ord, California where he planned to search for new employment. Wayne Dean, Director of Personnel at DHL, would not approve Mr. Kim's request for LWOP unless he, *inter alia*, provided a post-dated resignation effective at the end of the requested leave period. These

preconditions were not required of other similarly situated employees seeking LWOP, and were in fact contrary to Army Regulations.

On May 6, 1992, as demanded by his superior, Mr. Kim signed a personnel action form resigning his position effective October 28, 1992, and Director Dean approved his LWOP.

In June 1992, Mr. Kim sought EEO counseling regarding the conditions that Director Dean had impermissibly imposed on him. In September 1992, an EEO counselor met with Director Dean to discuss Mr. Kim's claims.

On October 12, 1992, while on leave, Mr. Kim wrote to Director Dean requesting an extension. When he did not receive a response he returned to Korea to resume work, lest he be terminated. U.S. Army Regulation 2-513, paragraph 5.3 (1990) provides: "If an employee fails to return to duty within 7 calendar days of the expiration of the particular approved period of leave without pay, he or she may be separated for abandonment of position".

On October 27, 1992, Mr. Kim notified Director Dean that he was withdrawing the resignation he had been forced to sign. For more than three months, Mr. Kim would hear nothing in response to either his October 12th or October 27th correspondence.

On December 30, 1992, he filed a second EEO complaint, alleging *inter alia*, that he was being retaliated against.

On February 3, 1993, Director Dean, despite the fact that the request for extended leave had been mooted more than

three months earlier by Mr. Kim's withdrawal of his resignation, "granted" the request.

On December 15, 2000, the District Court conducted a hearing on the Army's Motion to Dismiss and for Summary Judgment. At the conclusion of the hearing, the District Court orally delivered its opinion. In pertinent part the Court held:

> Viewing the record in the light most favorable to Mr. Kim as the nonmoving party, the Court must conclude that he has failed to state a claim upon which relief can be granted, in that he has not made out a *prima facie* case of retaliation. So the motion to dismiss is granted.

More specifically, the District Court, applying the standards set forth in *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc) found that requiring Mr. Kim to resign as a condition of obtaining leave without pay was not an adverse action. The Court made no finding and did not address the Army's refusal to reinstate Mr. Kim after he withdrew his resignation, *i.e.*, his *de facto* termination.

The Court then issued a written order, dated December 15, 2000, granting the Army's Motion to Dismiss, but denying its Motion for Summary Judgment.

The District Court dismissed Mr. Kim's complaint before discovery had even commenced and despite the filing of a Rule 56(f) affidavit setting forth the need for discovery.

In an unpublished, *per curiam* opinion, the United States Court of Appeals for the Fourth Circuit affirmed the decision of the District Court, noting that the Army's motion to dismiss should have been treated as a motion for summary judgment because matters outside the pleadings had been considered.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Standard for Determining Which Employer Activity Violates 42 U.S.C. § 2000e-3 Fails to Effectuate the Purpose of That Law. This Court Should Annunciate a Standard Which Prohibits Any Conduct Which Deters, Discourages or Chills Employees in the Exercise of Their Rights.

The Courts below found that Petitioner Kim's case was properly dismissed because he could not establish that he had suffered an adverse personnel action. This conclusion is premised solely on the finding by the District Court that imposing the condition of a post-dated resignation, which is contrary to Army Regulations, is not an ultimate employment decision and does not meet the requirements for a § 2000e-3 violation as annunciated in *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981). The Court of Appeals affirmed and in passing notes that Petitioner did not meet the standards set forth in *Von Gunten v. Maryland*, 243 F.3d 858, 863, 866 (4th Cir. 2001). More importantly, however, the lower Courts ignored Petitioner's contention that he withdrew his resignation, but was denied a return to paid employment as was his right.

Von Gunten reiterated an "[u]ltimate employment decision" is not the standard in [the Fourth] circuit". In doing so the Court distinguished itself from the Fifth Circuit which adopted an ultimate employment decision standard in *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997). The Fourth Circuit notes, "[o]f course, § 2000e-3 does not confine its reach to 'personnel actions' and thus [the] reasoning [in *Mattern*] does not apply to retaliation actions . . . ." (at 863) Thus,

> "retaliatory harassment" can also comprise adverse employment action [citing *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 363 (4th Cir. 1985)] What is necessary in all § 2000e-3 retaliation cases is evidence that the challenged discriminatory acts or harassment **effected the "terms, conditions or benefits; of the plaintiff's employment"** Emphasis added. [citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)].

Emphasis added.

In pertinent part, § 2000e-3 provides:

> **It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment,** for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, **because he has opposed any practice made an unlawful employment practice by this title [42 U.S.C. §§ 2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title**. Appendix C.

Emphasis added.

Both the Fourth and Fifth Circuits' standards fail to effectuate the purpose of § 2000e-3 which is, indisputably,

to encourage employees to exercise their rights under the Civil Rights Act and to prevent employer's from discouraging and deterring them from doing so.

Accordingly, the standard which this Court is urged to adopt is that § 2000e-3 is violated by any employer conduct which deters, discourages or chills an employee in the exercise of his and her rights under the civil rights laws whether or not such treatment effects terms, conditions or benefits of the plaintiff's employment.

> Discrimination lawsuits such as this one are filed on behalf of people without power, influence or money, against those that have all of these resources, to vindicate rights that evidence a great nation and are glowingly guaranteed in constitutions and statutes, but which, in real life, all too often do not exist as promised for all that they are intended to encompass.

Report and Recommendation in *Thompson v. HUD*, Docket No. MGJ-95-309 (D. Md., December 12, 2001) (Paul Grimm, Mag. J.)

II. A federal government employee states a cause of action for retaliatory discharge under 42 U.S.C. § 2000e-3 (Title VII's "Opposition Clause") when his complaint alleges that: (1) as a condition precedent to obtaining leave without pay he was impermissibly required to submit a post-dated resignation; and (2) after he withdrew the impermissibly imposed resignation he was denied reinstatement to paid employment which was his right.

Army Regulation 215-3 states in pertinent part:

> 5-27 a. "Leave without pay" is a temporary nonpay status and absence from duty granted at the employees request. . . . * * *
>
> 5-27 b. * * *
>
> 5-28 * * *
>
> 5-29 Before approving extended leave without pay, the approving authority should determine that the employee expects to return to duty and that a benefit will accrue to the activity (such as . . . retention of a desirable employee). Since extended leave without pay encumbers a position and limits the ability of management to utilize resources, approval should be carefully considered. * * *
>
> 5-30 The maximum period of leave without pay is 1 year. If an employee fails to return to duty within 7 calendar days of the expiration of a particular approved period of leave without pay, he or she may be separated for abandonment of

> position. * * * Absence in leave-without-pay status does not alter an employee's status in a reduction in force.

Nothing in this regulation requires or permits the imposition of a requirement that one submit a post-dated resignation as a condition of being placed on leave without pay status. And any doubt is dispelled by the admission of Director Dean before the EEOC and contained in a transcription of his testimony as an exhibit to Respondent Army's motion for summary judgment:

> Q. Okay. Now, this issue about leave without pay, you're not claiming there is a regulation requiring you to get a resignation to give a leave without pay, are you?
>
> A. There was not at Dragon Hill Lodge.

Nonetheless, Petitioner Kim was required to submit to his superior's *ultra vires* demand to submit a post-dated resignation in order to obtain approval for leave without pay. Under these circumstances Petitioner's proffered resignation can only be described as involuntary, contrary to the finding of the lower courts.

This becomes all the more significant when before the date the resignation was to become effective, Petitioner withdrew his compelled resignation and attempted to resume paid employment as was his right as an employee on leave without pay status.

"An employee generally has the right to withdraw her resignation before its effective date. See 5 C.F.R. § 715.202(b) (1996)". *Tretchick v. DOT*, 109 F.3d 749 (Fed. Cir. 1997). And when an agency refuses to honor the withdrawal the resignation becomes a removal from service. *Thomas v. HUD*, 124 F.3d 1439 (Fed. Cir. 1997).

"Leading instances in which courts have found resignation to be involuntary and, hence, without legal effect are those involving . . . situations in which the employee sought unsuccessfully to withdraw the resignation before its effective date [citation omitted]." *Leone v. United States*, 204 Ct. Cl. 334, 340 (1974).

"It is now hornbook law in our jurisdiction that an involuntary resignation constitutes an adverse action by the agency." *Gratehouse v. United States*, 206 Ct. Cl. 288, 296, 512 F.2d 1104 (1975).

In October 1992 Petitioner withdrew his resignation, yet the Army failed to return him to pay status. In other words, by its failure to acknowledge and accept Petitioner's withdrawal of his resignation the Army terminated him.

CONCLUSION

To effectuate the purpose of 42 U.S.C. § 2000e-3 this Court is asked to articulate a standard that any employer action which discourages, deters, or chills an employee's exercise of his or her rights under the civil rights laws constitutes unlawful retaliation. In doing so, this Court is asked to overrule the various and more stringent standards of the Circuit Courts of Appeal which require that retaliatory conduct adversely impact a plaintiff's terms and conditions of employment.

In the case *sub judice*, this Court is asked to reverse summary judgment granted in favor of Respondent Secretary of the Army by the District Court and affirmed by the Fourth Circuit Court of Appeals.

The Court is further asked to determine that the Army engaged in conduct that would discourage, deter or chill Petitioner in the exercise of his rights by impermissibly requiring him to resign as a condition of approving his request for leave without pay, failing to respond to his first request for an extension of leave, and later failing to acknowledge and accept the withdrawal of his resignation.

Finally, this Court is asked to find that the Army's failures constituted its *de facto* termination of Petitioner.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED OCTOBER 1, 2001

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 01-1097

JOHN P. KIM,

Plaintiff – Appellant,

versus

LOUIS CALDERA, Secretary of the Army,

Defendant – Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, Senior District Judge. (CA-00-1531-A)

Submitted: August 31, 2001 Decided: October 1, 2001

Before WILKINS, TRAXLER and GREGORY, Circuit Judges.

* * *

PER CURIAM:

John P. Kim appeals the district court's order granting Appellee's motion to dismiss and dismissing with prejudice

Appendix A

Kim's employment discrimination action alleging retaliation. We have reviewed the parties' briefs, the joint appendix, and the district court's reasoning stated from the bench and find no reversible error. We agree with the district court that Kim suffered no adverse employment action and, therefore, failed to state a prima facie case of retaliation. *See Von Gunten v. Maryland*, 243 F.3d 858, 863, 866 (4th Cir. 2001); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc). Accordingly, we affirm on the reasoning of the district court.* *Kim v. Caldera*, No. CA-00-1531-A (E.D. Va. filed Dec. 15, 2000; entered Dec. 18, 2000). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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* Where, as in this case, the district court considered matters outside the pleadings, it should have treated the motion to dismiss as a motion for summary judgment. Fed. R. Civ. P. 12(b); *Laughlin v. Metropolitan Wash. Airports Auth.*, 149 F.3d 253, 260-61 (4th Cir. 1998). Because Kim had ample notice of a possible conversion and because Rule 12(b)(6) does not impose on the district court "an obligation to notify parties of the obvious," *id.* at 261, we find that any error in the court's characterization of Appellee's motion as a motion to dismiss was harmless error.

APPENDIX B — TRANSCRIPT OF MOTION HEARING AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION DATED DECEMBER 15, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CA 00-1531-A

JOHN P. KIM,

Plaintiff,

– vs –

LOUIS CALDERA, SECRETARY,

Defendant.

MOTION HEARING

December 15, 2000

Before: James C. Cacheris, Judge

* * *

[3] PROCEEDINGS

THE COURT: Kim v. Caldera.

Appendix B

MR. MARTIN: Good morning, Your Honor. Edward Martin for the Government, and with me today is Frank King, who is from the Army, and he will argue. We have previously filled out the form with the Clerk's Office, and at this time we will send it to —

THE COURT: Glad to have Mr. King with us.

Comes on the defendant's motion for dismiss and for summary judgment. Go ahead Mr. King.

MR. KING: Thank you, Your Honor. Good morning.

THE COURT: Good morning, sir.

MR. KING: Your Honor, the focal point of the defendant's motion to dismiss and for summary judgment here this morning is whether or not Mr. Kim suffered an adverse personnel action in the decisions to grant him leave without pay for five months and to require his resignation in exchange.

THE COURT: He wanted to come look for another job to be with his wife. Isn't that what he wanted to do.

[4] MR. KING: Yes, sir. That's correct. He was planning to leave Korea to return the California to look for other federal employment in that area because that's where his wife was living.

And in order to do that, he asked for leave without pay, which would give him the benefit of maintaining federal employment status while he looked for that job.

Appendix B

We would be able to maintain certain employment benefits, and then it would give him certain priority in the selection process for a new job.

THE COURT: But he had to resign in order to do that. Is that right?

MR. KING: Yes, sir, that's correct. His supervisor, Mr. Dean, requested that he submit a resignation effective at the end of his leave without pay period, and then there are also other requirements in there, things like handing in identification tags and ID cards and deregistering his vehicle in Korea so he could leave the country.

At the time it appeared and it was the representation of Mr. Kim that he did not intend to return to Korea to work, and that is one of the reasons why the resignation was requested. It was [5] a standard policy implemented all over Korea at the time.

And in fact on the side of the appropriated funds government employees, it was a policy that required resignation at the time that they submitted leave without pay.

Your Honor, the defendant did not engage in an adverse personnel action against Mr. Kim. His request for leave without pay was voluntary. The submission of his resignation was voluntary, and all of those actions do not speak of an adverse personnel action.

By definition, leave without pay is a temporary nonpay status, an absence from duty granted at the employee's

request. And once granted, it allows the employee to leave the employment in a no-pay status.

And in this case, the further benefit for Mr. Kim was that it maintained his federal status while he looked for another job in the United States.

THE COURT: I understand your argument. Okay.

MR. KING: Thank you, Your Honor.

THE COURT: Mr. Gagliardo.

[6] MR. GAGLIARDO: Thank you, Your Honor.

The facts as stated by counsel are true as far as they go. It is indeed true that Mr. Kim applied for leave without pay and that the personnel director at the Dragon Hill Lodge required as a condition precedent that he resign.

Let me address the issue of resignation first.

THE COURT: Is there anybody that has been treated different differently than he has?

MR. GAGLIARDO: We contend — the answer is yes. We contend that two employees prior to Mr. Kim's situation were allowed to take leave without pay without resigning.

There is discourse in the paper — in the papers filed in this matter which, if nothing else, establish, A, that these are disputed facts, and, B, that there is a need for discovery.

I think what counsel has done with all respect is they have tried to convert a de novo action to a review of an administrative decision. And clearly Congress in enacting Title 7 and applying the same to federal employees did not intend that to be so.

This is a new action. Mr. Kim is [7] entitled to further discovery.

So albeit true that in the administrative record there are two employees which we contend were not — excuse me, were not required to resign as Mr. Kim was and that this sets up the predicate to show a discriminatory intent, but it's not only premise that the case rests on.

That there may indeed be others, and Mr. Kim is entitled in this new action to discover that and in this action to present —

THE COURT: Wasn't as to one of them they said that that was an oversight, that this person — Dickerson.

MR. GAGLIARDO: Yes.

THE COURT: Yeah, that it was an oversight.

MR. GAGLIARDO: Well, I don't remember —

THE COURT: Okay.

MR. GAGLIARDO: Let me address that.

Appendix B

First of all, that's the self-serving statement of the person accused of being the discriminator and retaliator in this case.

Two, in one of the cases — this is what I don't remember, although if Your Honor gave me a moment, I would pull the exhibit.

[8] In the administrative record, one of the two people that we compared Mr. Kim to is alleged to have applied for leave without pay and to have resigned on the same day.

In my papers, I explained that that was not so, that the resignation was first, and the leave without pay was second.

The Army's response is to submit a document, but it is an altered document. It includes cross-outs and interlineations. And discovery should be had again in this new action to determine who made those changes, when they were made, et cetera.

I would say — and I don't want to rely on this alone — that the motion, if it is ever proper, is certainly not proper at this point in time. It is plainly premature at this point in time.

Going back to the issue, if I may, sir, regarding the resignation, Mr. Kim timely withdrew his resignation. Now, the nature of leave —

THE COURT: He wanted to get his job back, didn't he?

MR. GAGLIARDO: Sir?

Appendix B

THE COURT: He wanted to get his job [9] back.

MR. GAGLIARDO: That is correct. And, in fact, he returned to Korea. He physically returned to Korea, and those facts are not in dispute.

Mr. Kim had asked for a continuation of leave without pay. When he did not hear, he felt that he had no alternative but to return to assert his employment rights lest he be fired for abandonment of position, which the regulation says if one does not return within seven days of the expiration of leave without pay, one indeed may — or perhaps it says "shall." I'm not sure — be terminated for abandonment of position.

So Mr. Kim comes back to Korea, withdraws his resignation, and asserts pursuant to the Army regulation. And let me point out that I believe that the joint message that the defense rests on is subordinate to the regulation. They cannot undo the regulation with an interpretive memo, which is what the joint message is.

The regulation says that when your leave without pay is over, you return to work or you run the risk of termination.

By not answering Mr. Kim, by either extending his leave nor reinstating him to his job, [10] the personnel director in effect terminated him.

Couple that fact with the following: The personnel director takes no action until February 3. These other objections occurred at the end of October. So we have approximately three months and a little bit more time.

Appendix B

Nothing is done in that three months. At the end of the three months, the personnel director says, You can have another month's leave, but there is no job, so don't bother coming back.

Now, the real question is, When did the job — did the job disappear at all, a matter that should be discovered — subject to discovery in this case.

And, two, if it did disappear, did it disappear after Mr. Kim withdraw his resignation, after his leave without pay expired, after he attempted to assert his right under the regulation having been on leave without pay to return to his position.

The reg clearly says, The position remains encumbered during the period of leave without pay. Therefore, the personnel director was without authority to fill that job during Mr. Kim's term of leave without pay.

[11] If you take that strictly and literally, up to, excuse me, March 28 which was the extent — the period which was extended on February 3, up until March 28, the period, excuse me, the position could not be encumbered.

To come back and say to Mr. Kim, You have no job; I can't — there is no job, so I can't reinstate you, is plainly contrary to what the regulation requires.

The fact that the personnel director acts so plainly contrary to the regulation is all evidence of pretext. A reasonable fact finder could certainly infer that the proffered reasons are pretextural.

Appendix B

Under the holding in *Reeves*, a plaintiff need not prove more to establish his prime facie case under Title 7.

Now, what we really have done is we have put this case on fast forward. I'm going to stop because these matters need to be fully developed in the course of discovery. And then based on a full and complete record adduced in this court in this action, we can argue whether the inferences are there or not.

THE COURT: All right, sir.

[12] MR. GAGLIARDO: Thank you, Your Honor.

THE COURT: Mr. King, what about the two other employees that plaintiff argues were similarly situationed?

MR. KING: Yes, Your Honor. There were two other employees who had requested leave without pay prior to Mr. Kim's request. The first was a woman named Ms. Best, Glenda Best, and the second was a woman named Suk Dickinson.

Both of these employees, the same as Mr. Kim, had intended to leave Korea on their spouse's permanent change of station orders back to the United States, and they requested leave without pay for the purpose of securing federal employment in their new duty assignment.

There is no evidence in the record, Your Honor, to suggest that these women or any other employee was treated any differently than Mr. Kim in this regard.

Appendix B

Both employees were required to process the same paperwork that Mr. Kim was required to process, to include a resignation form effective at the end of their leave without pay period.

Now, in the case of Ms. Dickinson, there was an administrative error where her supervisor in [13] processing the paperwork through failed to ensure that Ms. Dickinson had signed the paperwork, but the same paperwork without her signature went through the process.

And once that error was recognized, Mr. Dean contacted Ms. Dickinson and required her signature on the form, which was done. And she, as well as every other employee in the same circumstances, was required to resign either at the end of their leave without pay period or upon securing federal employment in the United States.

Your Honor, the government would also like to point out that no amount of discovery in this case is going to change the fact that what happened to Mr. Kim was not an adverse personnel action. It is not going to change the voluntariness of his request for leave without pay or the voluntary submission of his resignation under the circumstances.

And I would also further note, Your Honor, what Mr. Kim had gone through this exact process in 1986 when he left the United States Coast Guard to go to Korea to be with his spouse when she was assigned in Korea.

The exact same requirements were placed [14] upon him, to which he complied and which he experienced and

ultimately did resign from the Coast Guard at the expiration of the period of time.

Your Honor, the uncontroverted evidence before you establishes that no adverse action was taken against Mr. Kim. And, therefore, he cannot meet his prima facie case to show retaliation discrimination.

And as a result, the defendant is entitled to the judgment as a matter of law. Thank you.

THE COURT: This matter is before the Court on defendant's motion to dismiss and for summary judgment.

Plaintiff John P. Kim was employed as a personnel clerk at Dragon Hill Lodge, a facility run by the Department of the Army in Seoul, South Korea, from approximately October '91 until October 1992.

In April 1992, plaintiff had requested temporary leave without pay status so he could find new employment in the vicinity of his wife's new military assignment in Fort Ord, California.

The Dragon Hill Lodge had a policy [15] requiring employees to submit their resignation effective at the end of the leave without pay period before leave without pay status would be granted.

On October 12, 1992, plaintiff requested a five-month extension of leave without pay. That request was initially denied, but then approved on the February 3, 1993.

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October 27, 1992, plaintiff sought to withdraw his earlier-tendered resignation. That request was denied. Plaintiff's resignation was effective March 29, 1993.

Plaintiff filed an EEO complaint regarding these events on November 12, 1992. In that complaint, he alleged that his leave without pay request was treated differently from that of other employees.

He filed a second EEO complaint on December 30, 1992, alleging retaliation. An investigator concluded that the evidence did not support the complaints.

On EEOC administrative judge thereafter heard the matter and concluded there was not sufficient evidence of discrimination. Defendant adopted that decision on December 25, 1997, which [16] plaintiff appealed to the EEOC Office of Federal Operations.

That office upheld the EEOC administrative judge's decision on February 16, 2000. Plaintiff then filed the instant lawsuit in the District Court for the District of Columbia. On an unopposed motion by defendant, the action was transferred to this court.

A Rule 12(b)(6) motion to dismiss tests the legal sufficiency of the complaint and should be granted only if it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *De Sole v. United States*, 947 F.2d, 1169, 1177 (Fourth Circuit 1991); *Rogers v. Jefferson-Pilot Life Insurance Company*, 883 F.2d 324, 325 (Fourth Circuit 1989).

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In passing on a motion to dismiss, "The allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236, a 1974 case.

Moreover, a motion to dismiss must be assessed in light of Rule 8's liberal pleading standard, which requires only "a short and plain statement of the claim showing that the pleader is [17] entitled to relief." Federal Rule of Civil Procedure 8.

The complaint need only state sufficient facts to enable the defendants to draft a responsive pleading. See 5A Wright, Miller & Cooper, Federal Practice and Procedure 2d 1357.

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material matter and that the moving party is entitled to a judgment as a matter of law." Federal Civil Procedure 56(c). See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, a 1986 case. *Shaw v. Stroud*, 13 F.3d 791, 798 (Fourth Circuit) cert. denied, 513 U.S. 813 (1994).

In reviewing the record on summary judgment, "The Court must draw any inference in the light most favorable to the non-movant." *Brock v. Entre Computer Centers*, 933 F.2d 1252, 1259 (Fourth Circuit 1991.)

The party seeking summary judgment has the initial burden to show the absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). [18] However, the mere existence of a

scintilla of evidence in support of a nonmoving party's position is insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 252.

Rather, the Court must "determine whether the record taken as a whole could lead a reasonable trier of fact to find for the non-movant." *Anderson*, 477 U.S. at 252; *Brock*, 933 F.2d at 1259.

Plaintiff's complaint only alleges a single count alleging retaliation. To establish a prima facie case of retaliation, a plaintiff must show that "the employee engaged in — "(1) The employee engaged in protected activity; (2) The employer took adverse employment action against the employee; and (3) a causal connection exists between the protected activity and the adverse action." *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 365 (Fourth Circuit 1985).

The employer may then rebut the prima facie case by showing that there was a legitimate, nondiscriminatory reason for the adverse action. That's the *Ross* case citing *Womack v. Munson*, 619 F.2d 1292, 1296, (Eighth Circuit 1980).

The employer need not prove the absence of a retaliatory motive. The employer need only [19] raise a genuine issue of fact as to whether retaliation for the protected activity occurred.

If the employer produces a legitimate nondiscriminatory reason, the employee bears the ultimate burden of proving retaliation by demonstrating that the employer's proffered

reason is pretextual. At that point, the plaintiff must demonstrate that engaging in the protected activity was "motivating part" in the employer's adverse employment action against the plaintiff. *McNairn v. Sullivan*, 929 F.2d 974, 980 (Fourth Circuit 1991.)

Mr. Kim's claim that he suffered retaliation must fall. The first element of a prima facie case of retaliation is met by proof that plaintiff filed several charges of discrimination with the EEOC office the years as a civilian employee in South Carolina (sic).

However, as to the second element, the plaintiff claims that the requirement that he submit his resignation with the application for leave without pay status constitutes adverse employment action.

The Court disagrees.

The Fourth Circuit has recognized that an [20] "adverse employment action" requires a decision such as hiring, granting leave, discharging, promoting, or compensating the employee. See *Page v. Bolger*, 645 F.2d 227, 233 (Fourth Circuit 1981) (en banc).

A plaintiff who voluntarily resigns has not suffered an adverse employment action under Title VII. See *Evans v. Davie Truckers, Inc.*, 769 F.2d 1012, 1014 (Fourth Circuit 1985).

The record clearly shows that Mr. Kim voluntarily resigned his employment with the Dragon Hill Lodge. He

therefore suffered no adverse employment action at the hand of defendant.

Mr. Kim requested and was granted leave without pay. As a condition, he was required to submit his resignation. Army regulations establish that a grant of leave without pay is within the discretion of the employee's supervisor. Army regulation 215-3, paragraph 5.29.

Certain categories of employees may receive leave without pay as of right, but Mr. Kim does not fall into one of those categories.

When leave without pay status is granted at the employee's request, no adverse employment action has been suffered despite the fact that [21] conditions are attached, such as submission of resignation, when other employees seeking the same benefit are subject to the same restriction.

The record shows that other employees at the Dragon Hill Lodge were similarly required to submit their resignations when they sought leave without pay status to seek employment at their spouse's new duty station.

And, again, as referred to earlier, apparently, Suk Dickinson, that's S-U-K, Dickinson, was not required to submit a resignation, and there is a statement in here that the failure to resign was an oversight. Three other employees did resign when they requested leave without pay, one before and two after Ms. Kim.

That's Defendant's Exhibit 43, pages 17 to 18.

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Moreover, defendant advances legitimate, nondiscriminatory — and, by the way, there is other exhibits here, I may add. Defendant's Exhibits 22, Glenda Best, 28, Suny Cho, 32 Ursula Bolden.

Moreover, the defendant advances legitimate, nondiscriminatory reasons for its actions, and plaintiff fails to demonstrate that [22] those reasons are pretextual and that the requirement that he resign was actually based on an impermissible factor. See "Henson v. Liggett Group, Inc." 61 F.3d 270, pages 274-75, (Fourth Circuit 1995).

Evidence in the record indicates that civilian employees in South Korea often apply for leave without pay in order to search for a new job at their military spouse's new assignment without suffering a break in their federal employment.

This was the reason for Mr. Kim seeking leave without pay, and his request did not suggest that if the job search proved unsuccessful he would seek to return to his job at Dragon Hill Lodge.

Furthermore, it is not unreasonable for his employer, anticipating permanent departure of an employee from the job and, indeed, from the country, to require the employee to submit his resignation effective at the end of the leave without pay period.

Arguably, Army policy suggests Mr. Kim should not have been granted leave without pay since he stated no intention to return to his job at Dragon Hill Lodge, see AR 215-3, paragraph 5.29. However, the apparent expection that he

would not [23] return is a legitimate reason for requiring his resignation immediately.

See also Defendant's Exhibit 46 at pages 2 and 3.

In fact, Army policy in place when Mr. Kim resigned instructed supervisors to "assure that the resignation SF-52s are initiated as soon as family members know their departure dates." Defendant's Exhibit 48, page 5.

And also the evidence shows that Dragon Hill was downsized in the relative time period.

In short, Mr. Kim's supervisor has a valid nondiscriminatory reason to require Mr. Kim's resignation and then to reject Mr. Kim's attempt to withdraw that resignation.

Viewing the record in the light most favorable to Mr. Kim as the nonmoving party, the Court must conclude that he has failed to state a claim upon which relief can be granted, in that he has not made out a prime face case of retaliation.

So the motion to dismiss the granted.

Thank you.

(Whereupon, the proceedings in the above-captioned matter were concluded.)

* * * *

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

CIVIL ACTION 00-1531-A

JOHN P . KIM

Plaintiff,

v.

LOUIS CALDERA

Defendant.

ORDER

For reasons stated in open court, it is accordingly ORDERED:

(1) defendant's motion to dismiss is GRANTED and defendant's motion for summary judgment was DENIED.

(2) that the Clerk shall forward copies of this Order to all counsel of record.

s/ James C. Cacheris
United States District Judge

Alexandria Virginia
December 15, 2000

APPENDIX C — STATUTE AND REGULATION INVOLVED

42 USCS § 2000e-3 (2001)

§ 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [*42 USCS § § 2000e*-2000e-17], **or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title** [*42 USCS § § 2000e*-2000e-17].

(b) Printing or publication of notices or advertisements indicating prohibited preference, limitation, specification, or discrimination; occupational qualification exception. It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to

any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

HISTORY: (July 2, 1964, P.L. 88-352, Title VII, § 704, 78 Stat. 257; Mar. 24, 1972, P.L. 92-261, § 8(c), 86 Stat 109.)

Army Regulation 215-3, ch. 5, § V

Section V
Leave Without Pay

5-27. General

a. "Leave without pay" is a temporary nonpay status and absence from duty granted at the employee's request. The permissive nature of leave without pay distinguishes it from "absence without leave" (AWOL). AWOL is a nonpay status resulting from management's decision that no leave of any type (including leave without pay) will be granted for the period of absence for which the employee did not obtain prior approval.

b. Periods of leave without pay of less than 5 workdays need no documentation other than the appropriate entry on time and attendance records. Periods in excess of 5 workdays will be documented by submission of DA Form 4017 to the civilian personnel office. The DA Form 4017 will be placed on the left side of the personnel folder.

5-28. Granting leave without pay

a. Leave without pay will be granted as a right in the following cases:

(1) For disabled veterans needing medical attention.

(2) For Reservists and National Guard personnel who enter on authorized military training duties not covered by military leave. (See section VII, below.)

(3) For employees injured in the performance of their duties (para 5-17).

b. Upon approval of the NAFI manager, leave without pay may be granted for illness or disability not of a permanent or disqualifying nature or for other reasons acceptable to the manager. If an employee applies for and is granted leave without pay, the period of leave may not, at any time thereafter, be converted to annual or sick leave except as provided in paragraph 5-17c.

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5-29. Approval of extended leave without pay

Before approving extended leave without pay, the approving authority should determine that the employee *expects* to return to duty and that a benefit will accrue to the activity (such as protection or improvement of the employee's health or the retention of a desirable employee). Since extended leave without pay encumbers a position and limits the ability of management to utilize resources, approval should be carefully considered. Management may disapprove requests for leave without pay except for reasons stated in paragraph 5-28a.

5-30. Duration of leave without pay

The maximum period of leave without pay is 1 year. If an employee fails to return to duty within 7 calendar days of the expiration of the particular approved period of leave without pay, he or she may be separated for abandonment of position. An employee who has been granted leave without pay due to on-the-job injury will, at the end of 1 year, be separated without prejudice if it has been determined by medical authority that he or she is unable to return to duty and if all reasonable efforts to reassign to another position have failed. This separation action will be in accordance with chapter 11 and does not affect or prejudice any claims or payments under workers' compensation or disability retirement. If the employee subsequently becomes available for duty, he or she may be reemployed noncompetitively. Absence in a leave-without-pay status does not alter an employee's status in a reduction in force.

* * * *